IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELALTE SIDE

FIRST APPEAL NO.1980 OF 2005
WITH
CIVIL APPLICATION NO.4723 OF 2005

Kishormal Bhabootmal Jain. ...Appellant.
Vs.
Municipal Corporation for Greater Mumbai & Ors. ...Respondents.
....
Mr. P. M. Joshi i/b. Mr.A. J. Rizvi for the Appellant.
Mr.J. J. Xavier for the Respondents.
.....
CORAM : DR. D.Y. CHANDRACHUD, J.

December 5, 2005.

P.C.:

Admit. With the consent of Counsel appearing on behalf of the contesting parties, the appeal is taken up for hearing and final disposal With the assistance of Counsel, the pleadings and evidence have been perused.

2. This First Appeal arises out of an order of the City Civil Court dated 15th September 2004, dismissing the suit instituted by the Appellant seeking declaratory and injunctive relief in respect of notices issued by the Municipal Corporation calling for the removal of unauthorised construction carried out by the Appellant. The

Appellant is a tenant of premises situated on the Third, Fourth and Fifth Floors of a building known by the name of 'Krishna Bhuvan', situated at First Carpenter Street, Mumbai-400 004. The Appellant instituted a declaratory suit in the Small Causes Court while the landlord had instituted a suit in the City Civil Court for declaratory and injunctive relief. Consent Terms were arrived at before the Small Causes Court on 22nd March 1985 and the dispute was resolved. On 12th August 1982, the Municipal Corporation issued a notice under Section 351 complaining that the Appellant had carried out unauthorised work of of the following description :

> "(1) Unauthorised construction on the front side set back terrace on 3rd and 4th floors with A.C. Sheets roof and glass windows, admeasuring 10' 4'' x 6'2'' and 18'6'' x 17'6'' respectively.
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> -(2) Unauthorised covering on the rear side back terrace on 4th floor with A.C. Sheet roof and B. M. Walls and construction of W.C. W. P. therein.
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> -(3) Unauthorised construction of room on 5th floor terrace with A.C. Sheets covering with glass windows admeasuring 16' x 6'' x 7'-3''."

The Appellant submitted a reply on 30th August 1982 denying the allegations in the notice. On 15th December 1982, a further notice was issued under Section 351 alleging an unauthorised construction on the Third and Fourth Floors of the set back terrace on the front side of the building. The appellant submitted a reply on 23rd December 1982. The Municipal Corporation on 11th March 1983 issued a communication holding that the Appellant has failed to produce any documentary evidence showing the authorisation of the structure and called for the removal thereof. The Appellant instituted Suit 4841 of 1983 in the City Civil Court. It is common ground that on 3rd June 1985, the building was sold by the erstwhile landlord to Smt.Somatidevi K. Jain, the wife of the Appellant. In 1984-85, repairs were carried out to the building by the Repair Board and during the course of the repair work, the unauthorised work which was found to exist was removed. Thereafter, according to the Municipal Corporation, unauthorised work was once again commenced upon which a notice under Section 351 was issued. The earlier notices were withdrawn on 23rd April 1986 before the City Civil Court since as noted above, the building had been repaired by the Repair Board. However, once again, it was found that unauthorised construction work had been commenced, this

time above the Fourth Floor terrace and a notice under Section 488 was issued on 11th March 1986. On 23rd April 1986, a notice came to be issued under Section 53(I) of the Maharashtra Regional and Town Planning Act, 1966, alleging the unauthorised construction of a structure above the Fourth Floor terrace and seeking the removal thereof. Orders were passed by the Deputy Municipal Commissioner, after the Appellant submitted a reply, holding that the construction was unauthorised and could not be tolerated. The Appellant instituted a suit before the City Civil Court for declaratory and injunctive relief which has been dismissed by the judgment and order impugned in these proceedings.

3. Two submissions have been urged on behalf of the Appellant. The first submission is that the notice which was given under Section 53(1) of the Maharashtra Regional and Town Planning Act, 1966 must fail for the reason that an earlier notice had been issued in the year 1982 and which, after it was challenged in a suit before the City Civil Court came to be withdrawn. The second submission is that the notice under Section 53(1) was invalid since it ought to have been given to the owner of the building and not to the Appellant who was a tenant.

4. There is no merit in either of the two submissions. In so far as the prior notice dated 12th August 1982 under Section 351 is concerned, it is evident that the aforesaid notice was in respect of a separate unauthorised construction. As the extract in para 14 of the judgment and order of the Learned Trial Judge would show, the earlier notice was in respect of the unauthorised construction on the Third and Fourth Floors and an unauthorised construction of a room on a Fifth Floor terrace. In fact, the contention of the Municipal Corporation was that when the premises were repaired by the Repair Board, the unauthorised construction which was made earlier was removed and it was thereafter that the Appellant had once again commenced the work of unauthorised construction. The notice dated 25th April 1986 which was challenged in the suit was in respect of the construction which was unauthorisedly carried out above the Fourth Floor terrace. Hence, ex-facie it is clear that the construction which is alleged to be unauthorised and the notice issued on 25th April 1986 was not the same as that which formed the subject matter of the earlier notice under Section 351 that was issued on 12th August 1982.

5. In so far as the second submission is concerned, there is no merit therein. The Learned Trial Judge has in the course of his judgment taken due note of the fact that the premises came to be purchased by a member of the family of the Appellant and it is common ground before this Court, that the member of the family is none other than the wife of the Appellant. The Appellant did not produce any documentary material in support of the authorisation of the work which had been carried out. Neither the sanctioned plan, nor the City Survey record was produced. The Learned Trial Judge was justified in drawing an adverse inference particularly when the premises had been purchased by a member of the family of the Appellant despite which absolutely no material was produced demonstrating the authorisation of the work that was carried out or its existence prior to the datum line. Section 53(1) of the Maharashtra Regional and Town Planning Act, 1966 refers to a situation wherein any development of land has been carried out as indicated in sub-section (1) of Section 52. Sub-section (1) of Section 52 in turn refers to a situation where any person either at his own instance or at the instance of any other person commences, undertakes or carries out development or changes the use of any land without permission, in contravention of the

permission that has been granted, after the permission has been revoked or in contravention of a modified permission. In that event, the Municipal Corporation is empowered to take steps after notice to the owner. The expression “owner” is defined in inclusive terms in Section 2(18). In the present case, the Municipal Corporation has specifically set up the defence that the unauthorised construction was being carried out by the Appellant himself and, therefore, with reference to the unauthorised work which was being carried out, a notice was correctly served upon the Appellant who was the owner of that work. This is indeed a correct interpretation since Section 53(1) and Section 52(1) must necessarily mean an opportunity to show cause to the person at whose instance the unauthorised work has been carried out and who has, therefore, an interest in that work. In any event, in the present case, as noted by the Learned Trial Judge, it was the wife of the Appellant who is the owner of the building. The Appellant had sufficient opportunity to demonstrate that the work was in existence prior to the datum line or that it was authorised. The Appellant was not able to establish that. The Learned Trial Judge, therefore, justified in dismissing th suit. There is no merit in the First Appeal which is accordingly dismissed.

In view of the disposal of the appeal, the Civil Application does not survive and is accordingly disposed of.

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